

**Re LOW SHONG KHAY, ex parte
SIME DARBY & CO., LTD.**

[Bankruptcy Jurisdiction (Taylor, J.) October 3, 1950]

[Selangor — Bankruptcy No. 5 of 1950]

Bankruptcy procedure — Whether affidavit can be read if the deponent fails to attend for cross-examination after due notice.

In bankruptcy the Court will not allow an affidavit to be read if the deponent fails to attend for cross-examination after due notice. *Re Krishnasami*⁽¹⁾ followed; *Chan Chou Har v. Chan Phooi Hoong*⁽²⁾ distinguished.

This was a creditor's petition for a receiving order; the debtor filed an affidavit in opposition; the petitioning creditors gave notice to cross-examine him on his affidavit; when the petition came on for hearing the debtor was not present.

Cases referred to:—

- (1) *Re Krishnasami* (1933) M.L.J. 195; (1933-1934) F.M.S.L.R. 8.
- (2) *Chan Chou Har v. Chan Phooi Hoong* (1939) M.L.J. 327.

BANKRUPTCY PETITION.

F. G. Charlesworth, for the petitioning creditors, objected to the affidavit being read, relying on *Re Krishnasami*, *supra*.

M. N. Cumarasami, for the debtor, argued that *Krishnasami's* case was, in effect, overruled by *Chan Chou Har's* case, *supra*.

Taylor, J. : — Our bankruptcy procedure follows very closely the English procedure at the date when the Rules were made and the English cases and practice are applicable. The Rules constitute a code of procedure quite separate from, and independent of, the Civil Procedure Code; this is emphasised by Rule 287; the two systems are quite distinct in their history, purpose and scope.

The course which *Krishnasami's* case⁽¹⁾ took in the Court of Appeal was peculiar and it seems not improbable that other reasons contributed to the result. However that may be, there was no decision of the higher Court and, regarded as an authority, the decision at first instance was neither affirmed nor doubted; it stands as the opinion of a single Judge. The judgment in *Chan Chou Har's* case⁽²⁾ is expressly founded on the Civil Procedure Code, and is not in point here. If the learned Judge's attention had been directed to Rule 287, I think he could, and would, have reached the same conclusion without feeling that *Krishnasami's* case raised any difficulty.

The two cases deal differently with the same point but they do not conflict; they deal with it in

different circumstances to which different legal rules apply.

The point now arising in a bankruptcy, I follow the bankruptcy precedent without departing from the precedent created in a civil action.

The affidavit cannot be read.

Order accordingly.

**CHEONG YOK CHOY AND ANOR. v. THE
COLLECTOR OF STAMP DUTIES,
KUALA LUMPUR.**

[App. Civ. Juris. (Taylor, J.) October 16, 1950]

[K.L. — Civil Appeal No. 10 of 1950]

Stamp Ordinance, 1949, ss. 16 and 39 — Procedure by case stated — Valuation of land by the Collector of Land Revenue.

Where the value of land affects the stamp duty on an instrument, the Collector of Land Revenue may be consulted and his opinion is admissible evidence of the value but may be controverted by other evidence.

On an appeal by way of case stated the appellants' solicitors should make the first draft of the case and the case should contain all necessary materials.

APPEAL to the High Court under section 39 of the Stamp Ordinance, 1949 (No. 59 of 1949).

E. A. S. Wagner for the appellants.

T. V. A. Brodie (Acting Solicitor-General) for the Collector of Stamp Duties, Kuala Lumpur.

The facts sufficiently appear from the Judgment.

Cur. Adv. Vult.

Taylor, J. : — This is an appeal from a decision of the Collector of Stamp Duties, Kuala Lumpur.

The appellants, who are father and son, are persons of considerable substance. The father decided to transfer certain lands in Kuala Lumpur Town to his son. After consultation with their solicitor the consideration was fixed at \$45,000.

This was not nominal. A cheque was drawn by the son and actually paid into the father's account by the solicitor. The transfer was stamped with \$450, this being appropriate to the consideration at the present rate of 1% *ad valorem*. The Registrar of Titles, doubting whether the instrument was sufficiently stamped, referred it to the Collector of Land Revenue who valued the land at \$56,000. The Registrar then referred the instrument to the Collector of Stamp Duties who claimed further stamp duty of \$110 on the basis of the land officer's valuation. The parties maintained that the instrument was sufficiently stamped

and required the Collector of Stamp Duties to state a case for the opinion of the High Court. The Collector of Stamp Duties invited them to submit to him evidence in support of their view that the land officer's valuation was too high; alternatively, he offered to have the land valued by another valuer appointed by both parties. The appellants declined both courses and brought these proceedings.

The substantive provisions of the Stamp Ordinance are these: a conveyance on an ordinary sale is stampable *ad valorem* on the price; a conveyance by way of gift is stampable on the value of the property; where property is transferred within a family it is unlikely that the vendor will exact as high a price as he would require from a stranger; the transaction may be genuine in the sense that money is actually paid but the value may well be appreciably higher than the expressed consideration so that the transferee obtains a substantial benefit which a stranger would not receive; in such a case price is not the test; the transfer is stampable on the value of the property. The question at issue, therefore, is simply: — What is the value of the land? "Value", for this purpose means market value and, apart from public auction, the market value of land can be proved only approximately by evidence of the opinion of well informed persons.

Counsel for the appellants first suggested that in regard to Town land the Government are bound by the valuation for Assessment; he said that a given lot cannot have materially different values for different taxes. I ignore entirely the point that the Municipality is now a separate body and deal with the matter as though the Town Board and the Stamp Office were both departments of the same Government. Even on that basis the argument is wholly untenable. Assessments for the purpose of rating are made on different principles of valuation from those applied in commercial appraisals and are revised periodically; they do not profess to follow market fluctuations. The rateable value is not in itself a measure of the market value but is one of the factors to be considered in estimating the market value. The appellants in fact admitted this principle by their actions, though not in their argument; their figure of \$45,000 is not the rateable value; the present assessment was made sometime ago and for the purpose of this transfer the appellants added 30%. But why thirty? Why not fifty, or ten?

Counsel then raised three objections to the valuation by the Collector of Land Revenue. He said, first, that the Collector is not an expert valuer of town land; secondly, that he has no statutory

function in this matter so that the reference to him was illegal; and, thirdly, that he is not independent.

On the first point, the Collector is certainly not a professionally trained valuer but in the course of his daily work he sees many transactions in land and if he, or some member of his staff, systematically watches them over a period of time and makes full use of his opportunities to distinguish between family arrangements and commercial dealings, (a matter of considerable difficulty, especially in this country where personal names are confusing) he is in a better position to acquire a knowledge of land values than any other one person. But the Collector has a wide range of duties and, as far as I know, valuation is not one of them; it is certainly not a duty imposed by the Land Code. In any case it must be a matter depending in some degree on personal and variable factors. Whether the Collector for Kuala Lumpur has been able to give effective attention to this matter during the last two or three years is a question of fact on which no definite information has been furnished.

The second point is technical. Land office information on values is derived chiefly from documents connected with registration of dealings; of these there are two classes; those relating to grants, which are dealt with by the Registrar of Titles, and those relating to the mukim registers, which are the exclusive concern of the Collector. All the land now in question is town land comprised in grants; the cumulative information to which I have referred therefore is available, primarily and mainly, to the Registrar himself and the reason why he referred to the Collector of Land Revenue is somewhat obscure. I doubt whether he would have done so if the land had been in the town, say, of Klang. But in Kuala Lumpur the Registry of Titles for the whole State of Selangor and the Land office for the District of Kuala Lumpur were, and probably still are, virtually one office. It appears from the correspondence that such references are usual and I infer that something in the nature of a departmental routine exists; many years have elapsed since I had direct personal knowledge of these matters; the law has changed very little but the practice may well have been altered. It is, indeed, possible that the deputy registrar who received the transfer and the assistant collector of land revenue who compiled the valuation were one and the same man, in a dual office; however that may be, the Registrar was under a statutory duty to see that the transfer was duly stamped before he made any memorial; he was entitled to consult his colleague and, although the Land Officer had no statutory function,

the reference to him was not illegal, nor unreasonable, nor objectionable on any ground of principle.

The third point, that the Collector of Land Revenue is not wholly independent, is obviously correct; his very title proclaims him a treasury official and no one could be misled for a moment; but this is mere comment.

In short, there is no objection to a valuation by the Land Officer being made and adduced; it is admissible evidence but not binding on anyone; it is open to criticism as to its cogency only.

In this particular case, however, the reference to the Land Office and a hitch in the Registry of Titles caused considerable delay and some inconvenience and one of the avowed objects of the appeal is to obtain an expression of my opinion on the practice. The appellants are wealthy and altruistic; they emphatically declare that they do not wish to litigate any squalid question of mere stamp duty. They are emulous to be commemorated as village Hampdens who with dauntless breast, the tyranny of bureaucrats withstood. They are misguided. It is true that expeditious conveyancing is one of the main objects of the Torrens law but if they want the practice to be overhauled they must find either a poet or a politician to take up the cudgels. The Court can deal only with the legality, not with the desirability, of administrative measures and can deal with the legality only of those points which bear specifically on the question at issue in each case as it arises. Despite the eloquence of their advocate the question here is merely the amount of the stamp duty on this one transfer. I cannot comment further on the administrative procedure but the action raises a question of legal procedure with which I must deal.

Section 39 of the Ordinance provides that:—

Any person who is dissatisfied with an assessment by the Collector (of Stamps) may.....appeal to the High Court and may.....require the Collector to state a case setting forth the question....."

The expression "state a case" is technical. It is true that under this section, as under many similar provisions, the officer of the tribunal appealed from is to "state" and sign the case but that does not mean that he is to draft it. It is for the appellant to frame his own contentions. The general practice is for the appellants' legal advisers to make the first draft of the case and send it to the respondent's advisers for their consideration, after which it is submitted to the presiding officer who alone can settle accurately that part of the document which expresses his findings of fact and his opinion on the points requiring decision.

It may be necessary for the parties to attend before the tribunal for final revision of the draft. The essence of a case stated is a joint statement by all three of the facts and of the outstanding issues, so that the appellate Court has the whole matter before it in the most concise form. Ordinarily one document suffices but occasionally a deed or a valuation may be annexed. This procedure cuts out the delay and expense of copying the many letters and other cumbrous documents which are comprised in the record of an ordinary appeal. It was objected at the hearing that this is not a convenient way of bringing an appeal on a disputed question of fact—and value is a question of fact. That may be so but the answer lies in the statute.

In this case the correct practice was not adopted. The appellants' solicitor merely demanded a case without ever offering a draft or (so far as appears) consulting the Law Officers. The Stamp Officer then issued a document headed "Case Stated." Whether he did so with or without advice does not appear but the document is not a "case stated" in the sense of the Ordinance. It is merely a history of the dispute. The Collector is not a legal officer but he should at least have complied with the provision of his own Ordinance which expressly requires him to "set forth the question." He omitted to do so. The issue can be gathered or inferred but not with sufficient completeness or precision. The appellants' solicitor therefore supplemented it by annexing eighteen other documents, some of which are irrelevant and all of which ought to have been unnecessary. In short, he proceeded on the lines of an ordinary appeal from a Magistrate, treating the so-called "case" as the judgment, but in his argument he submitted that the Stamp Officer was his substantial adversary in the litigation and that the onus of proof of his valuation was on him.

The real respondent to these proceedings is the Financial Secretary, on behalf of the public at large and the Solicitor-General appears for him accordingly. The Stamp Officer is, correctly, the titular respondent but that is quite consistent with his exercising a quasi-judicial function as regards the subject matter. There are many analogous situations under various statutes.

The issue of substance can be stated very shortly. What is the value of the land for the purpose of stamping the transfer? The appellants and their family solicitor, meeting in private without any other advice and without giving any particulars of their method of valuation, estimated it at \$45,000. The Collector of Land Revenue estimated it at \$56,000 also

without giving any particulars of his method. The Stamp Officer gave the appellants a fair and adequate opportunity to adduce further evidence and I do not doubt that he would, if so requested, have given them particulars of the Collector's method. The appellants replied to the effect that they would adduce their evidence in Court but they were never attempted to do so.

The Stamp Officer therefore had to decide the matter on the evidence then before him. He had to choose between two valuations—one by the directly interested party and one by a responsible public official who is independent in the sense that he is in a separate department and makes routine valuations for a variety of purposes. The Stamp Officer chose the latter and the question is whether he was right. Was the evidence sufficient?

A good deal was said about the onus of proof. In the first place the onus was undoubtedly on the parties to the transfer. The Ordinance expressly provides that they may be called upon to prove the facts relating to the instrument. They explained the circumstances and the Stamp Officer replied by adducing the Land Office valuation. That was, in the circumstances, enough to shift the onus back on to the appellants. Their complaint is that unless the amount of duty in question is so very large that the fees of a professional appraiser are small in comparison, the citizen is in the hands of the tax collector; he must either pay what is demanded, though he sincerely believes it to be excessive, or he must incur disproportionate and irrecoverable expense. There is nothing new or anomalous in this. Similar situations arise under all revenue statutes. If the Treasury had to employ outside appraisers on every occasion the costs of collecting the revenue would be enormously increased. The Government provide, at the cost of the public, a Land Office to furnish routine valuations.

In my opinion they have fully complied with the substance of the law. The decision of the Stamp Officer was clearly right on the evidence before him. I think it was sufficient and no further evidence has been adduced. The appeal is therefore dismissed. The appellants must pay the costs but in the circumstances I assess them at the inclusive sum of \$100/—, to save taxation.

Appeal dismissed.

NG KEAN TEK v. KAM HOCK LYE.

[Orig. Civ. Juris. (Jobling, J.) August 28, 1950]

[Penang—Civil Suit No. 220 of 1949]

*Contract—Sale of rubber to unlicensed dealer—
Delivery at future date—Purchaser not in possession
of licence required by Rubber Dealers Ordinance, S.S.
(Cap. 212) at the time when delivery due.*

The plaintiff in this case claimed specific performance of a contract made during the Japanese occupation for the delivery of fifty piculs of rubber within four months after the declaration of peace in Malaya. By the same contract the defendant agreed that in default of tapping and delivering the said rubber he should either purchase the same in the open market or pay to the plaintiff the full market price of fifty piculs of rubber on the expiration of four months from the declaration of peace in Malaya.

The defendant refused to deliver the rubber as agreed on the ground that the contract was invalid in law. The defendant contended that the plaintiff at all material times was not a licensed rubber dealer and therefore the contract was illegal in that the plaintiff could not enter into such contract for the purchase of rubber without a licence. The plaintiff contended that the defendant refused to deliver the rubber without ascertaining whether the plaintiff would obtain a licence before delivery and that therefore the second part of the contract note—the payment of the full market price of the rubber—was enforceable.

Held, that the Court will not order the enforcement of a contract where the enforcement would contravene the criminal law, nor will the Court make an order for payment of damages as this would be damnifying the defendant for not lending himself to the commission of a criminal offence. Action dismissed with costs.

Case referred to:—

- (1) *Syn Thong & Co. v. Tong Joo (Hoo) & Co.*
(1929) S.S.L.R. 39.

ACTION.

C. D. D. Hogan for the plaintiff.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Jobling, J.:—This is a claim for specific performance of a contract for the delivery of rubber sold by defendant to plaintiff.

It is admitted that the parties entered into an agreement for the sale and purchase of fifty piculs of rubber and that the defendant received the full purchase price thereof and executed the following contract note:—

"This is to confirm that I have this 14th day of August 2605 sold fifty (50) piculs of rubber (smoked sheet 2nd and 3rd grade) to Ng Kean Tek of No. 360 Beach Street, Penang.

I have received the full market price for the same. I shall deliver the rubber within four (4) months after the declaration of peace in Malaya. The rubber is to be tapped from my rubber estate at Belik Pulau, Lots 15, 16¹, 16² Mukim 7 and Lot 537 Mukim 9, S.W.D., Penang.